RECEIVED
AUG 29 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Local Exchange Carriers' Rates,	)	CC Docket No. 93-162
Terms and Conditions for	)	
Expanded Interconnection for	)	
Special Access	)	

DOCKET FILE COPY ORIGINAL

MFS COMMUNICATIONS COMPANY, INC.
OPPOSITION TO BELL ATLANTIC PETITION FOR CLARIFICATION

Cindy Z. Schonhaut
Vice President
Government Affairs
MFS Communications Company, Inc.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7709

Andrew D. Lipman
Jonathan E. Canis

SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500

Attorneys for
MFS COMMUNICATIONS COMPANY, INC.

Dated: August 29, 1994

No. of Copies rec'd 0+4
List ABCDE

SUMMARY

The Bell Atlantic Telephone Companies ("Bell Atlantic") asserts that a recent Commission order designating issues for investigation incorrectly stated Commission policy, and apparently asks the Commission to issue a statement that services offered by local exchange carriers ("LECs") on an individual case basis ("ICB") are not common carrier services, and so are not subject to Commission jurisdiction under Title II of the Communications Act of 1934.

As MFS Communications Company, Inc. discusses herein, Bell Atlantic's petition misrepresents established Commission policy on ICB ratemaking, misreads relevant Commission decisions and court precedent, and ignores critical public policy determinations. Indeed, the position espoused by Bell Atlantic would allow it unilaterally to eliminate Commission review of rates for selected services, and would virtually eliminate the Commission's ability to prevent unreasonably discriminatory, excessive or predatory rates. Bell Atlantic's petition is therefore antithetical to the dictates of the Communications Act, established precedent, and sound public policy.

The language in the Commission's order cited by Bell Atlantic does not constitute a reversal of policy, but rather a consistent application of ICB regulation that dates from 1984. In reviewing the first access tariffs in 1984, the Commission treated the new access charges as common carrier offerings, and held that ICBs for such new services would be permitted only as long as LECs had inadequate data to establish

averaged rate structures. The Commission reiterated this policy in its investigation of LEC DS3 charges in 1989 and 1990.

Bell Atlantic mischaracterizes the two Commission orders that it cites as support for its petition. In fact, both orders make clear that the Commission has applied its policy concerning ICB regulation consistently for a decade. Similarly, the recent Court of Appeals decision cited by Bell Atlantic fails to support its petition. That decision reached no conclusion regarding the Commission's jurisdiction over ICB-rated services and facilities. Rather, the decision found that, for a single service -- dark fiber provided by four LECs -- the Commission had not adequately explained its jurisdiction. In remanding that narrow issue to the Commission for further consideration, the Court expressly refused to prejudge the issue, and invited the Commission to identify adequate statutory and policy grounds to regulate dark fiber as a common carrier service.

Sound public policy, as reflected in prior Commission decisions and court precedent, compels rejection of the Bell Atlantic petition. Federal courts of appeals have found that carriers cannot evade common carrier status simply by filing customer-specific contracts. Moreover, the Commission has found that common carrier status will attach to a service if public policy considerations require that LECs provide the service in a reasonable and nondiscriminatory manner. For all of these reasons, the Bell Atlantic petition must be denied.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Local Exchange Carriers' Rates,	)	CC Docket No. 93-162
Terms and Conditions for	)	
Expanded Interconnection for	)	
Special Access	)	

MFS COMMUNICATIONS COMPANY, INC.
OPPOSITION TO BELL ATLANTIC PETITION FOR CLARIFICATION

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, and pursuant to Public Notice 44073[1/] hereby respectfully submits its opposition to the Petition for Clarification filed by the Bell Atlantic Telephone Companies ("Bell Atlantic") in the above-captioned docketed proceeding.

I. INTRODUCTION

On June 30, 1994, Bell Atlantic filed a petition seeking clarification of the Commission's recent *Supplemental Designation Order and Order to Show Cause* in CC Docket No. 93-162.[2/] In that order, the Commission stated that Bell Atlantic and two other local exchange carriers ("LECs") apparently "misunderstood the Commission's

---

1/ "Bell Atlantic Petitions for Clarification of ICB Service Offerings -- CC Docket No. 93-162," Public Notice 44073, dated July 26, 1994.

2/ *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 9 FCC Rcd 2742 (1994) (*Supplemental Designation Order*).

discussion of time and materials charges" associated with expanded interconnection,[3] and required the LECs to submit additional information regarding their expanded interconnection tariffs. In the course of that order, the Commission summarized its policy concerning the use of individual case basis ("ICB") ratemaking by LECs, stating that: 1) ICB ratemaking "represents a departure from normal practice;"[4] 2) once the LEC obtains sufficient knowledge concerning the cost of service, it is required to convert ICB charges to averaged, tariffed rates;[5] and 3) ICB rates are "generally available" if they are tariffed and are made available to all similarly situated customers.[6]

The Bell Atlantic petition argues that this statement constitutes a reversal of existing Commission policy regarding ICB ratemaking, and states that the Commission should "vacate" the above-cited language from the *Supplemental Designation Order.* While the relief sought by Bell Atlantic is not entirely clear, it appears that Bell Atlantic seeks a statement by the Commission that ICB arrangements are not common carrier services, and are not subject to Title II regulation by the Commission. Bell Atlantic's interest in such a restrictive interpretation of the Commission's jurisdiction is evident -- such an interpretation would allow Bell Atlantic to remove any service from the tariff review process simply by repricing it as an ICB. As a result, Bell Atlantic could effectively eliminate rate regulation for selected services at will, and could eviscerate the

---

[3] *Id.* at 2745.

[4] *Id.* at 2744.

[5] *Id.*

[6] *Id.* at 2744, n.35.

Communications Act's prohibitions against unreasonably discriminatory, excessive or predatory rates. As MFS discusses below, Bell Atlantic mischaracterizes the Commission's decisions regarding ICB pricing, and ignores relevant precedent and policy considerations. As a result, its petition merits summary denial.

II. THE COMMISSION'S DISCUSSION OF ICB RATEMAKING IN THE SUPPLEMENTAL DESIGNATION ORDER DOES NOT CONSTITUTE A POLICY "REVERSAL," BUT RATHER STATES A COHERENT POLICY THAT HAS BEEN APPLIED CONSISTENTLY FOR YEARS

Bell Atlantic argues that it has been longstanding Commission policy "not to consider ICB offerings as common carriage."[7/] Bell Atlantic attempts to support this assertion by citing language from a recent price cap order, a 1984 notice of proposed rulemaking, and the recent Court of Appeals decision that suspended and remanded two Commission orders concerning the regulatory treatment of LEC dark fiber offerings. As discussed below, Bell Atlantic grossly misreads these decisions, and ignores relevant Commission decisions and court precedent.

A. The Bell Atlantic Petition Ignores the Definitive Statement of Commission Policy Established in CC Docket No. 88-136

In 1989, in CC Docket No. 88-136, the Commission issued its first order in a three-year investigation of ICB ratemaking employed for high capacity DS3 services by the largest LECs, including Bell Atlantic. The Commission found that during the mid-1980s, the use of ICB ratemaking initially was reasonable, because when DS3 services were introduced, they were a new technology with little demand. Because LECs had

---

7/ Bell Atlantic Petition at 2.

little cost and demand data, the Commission found that averaged ratemaking was not possible. By the time the Commission initiated its investigation, however, the LECs had hundreds of DS3 circuits in operation, and clearly had adequate data to support averaged rates. Moreover, the Commission found that the ICB arrangements reflected gross disparities in rates charged to similarly-situated customers, and therefore found the ICB rates established by the LECs to be unreasonable.[8/]

The Commission later applied this analysis to dark fiber offerings, finding that four LECs had adequate experience to establish averaged rates.[9/] Moreover, the Commission expressly stated that its concerns over unreasonable discrimination required close scrutiny of all regulated services provided by LECs: "Our conclusion in the *ICB Order* that LECs must justify all departures from general rates is not, however limited to DS3s or DS3-equivalents. We accordingly expect that future LEC ICB filings for any service will explain the justification for offering a particular service on an ICB basis."[10/]

The ratemaking proceeding in CC Docket No. 88-136 -- which considered thousands of pages of comments and supporting materials by the LECs and interested parties -- stated clearly and succinctly the Commission's policy on ICB ratemaking. It was precisely this policy that was reiterated by the Commission five years later in the *Supplemental Designation Order*. Bell Atlantic's assertion that the language in the

---

8/ *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 4 FCC Rcd 8634 (1989).

9/ *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 5 FCC Rcd 4842 (1990).

10/ *Id.* at 4846.

Supplemental Designation Order is a reversal of established Commission policy is therefore patently incorrect -- the Commission has been fully consistent in applying the policy established in CC Docket No. 88-136 over the past five years. Moreover, as MFS discusses below, the Commission had evidenced this policy well before 1989.

B. The Bell Atlantic Filing Mischaracterizes the Two Commission Decisions Cited to Support Its Petition

Bell Atlantic cites two Commission decisions -- a 1984 notice of proposed rulemaking ("NPRM") and a 1990 decision regarding price cap rules -- as support for its assertion that the *Supplemental Designation Order* departs from established Commission policy. As discussed below, Bell Atlantic grossly misreads these decisions.

Bell Atlantic states that the Commission's *Special Construction NPRM*[11/] established that the Commission's policy in 1984 held that ICBs were "distinguished . . . from common carrier offerings."[12/] In addition, Bell Atlantic suggests that the Commission used the term "special construction lines" generically to describe all ICB offerings.[13/] Both of these assertions are patently incorrect.

First, the Commission's language that supposedly distinguished ICBs from common carrier offerings was not a statement of *existing* policy, but a *tentative definition* that the Commission proposed adopting in the NPRM.[14/] Thus, the proposal to treat

---

11/ *Special Construction of Lines and Special Service Arrangements Provided by Common Carriers*, 97 F.C.C.2d 978 (1984) (*Special Construction NPRM*).

12/ Bell Atlantic Petition at 3.

13/ *Id.*

14/ *Special Construction NPRM*, 97 F.C.C.2d at 991.

special construction as a non-common carrier service was not Commission policy in 1984, but rather would have been a reversal of Commission policy if it was adopted. Of course, the Commission did not adopt this proposed definition, and the statements in the NPRM never established Commission policy.[15/]

Indeed, the Commission stated its policy concerning ICBs unequivocally in another order issued in 1984 when the Commission reviewed the first access tariffs. In CC Docket No. 83-1145, the Commission reviewed, *inter alia*, the initial access tariff filed by the National Exchange Carrier Association ("NECA"). In its final order in that proceeding, the Commission made the following statement concerning ICB rates established by NECA in that tariff:

> Our review of the ECA access tariff has revealed a rate problem that warrants discussion . . . . In several instances . . . the rates for service elements are not set forth in the tariff. Rather, they are to be established on an "individual case basis" (ICB), -- that is, developed based on the circumstances in each case. Because the ICB rates apply primarily to service elements not previously offered by telcos, we recognize that it will take some time for them to develop rates for certain facilities offered under these elements. For this reason, we are allowing the ECA to use the ICB approach in this filing. *However, as the telcos develop rates or generally applicable regulations for these facilities we expect those rates and regulations to be set forth in the ECA access tariff.*[16/]

Thus, it is clear that the Commission's policy of allowing new services to be priced at ICB levels only until LECs had adequate experience and data to establish averaged,

---

15/ *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 845 (1986) (holding that "[i]t goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute . . .").

16/ *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1143 (1984) (citation omitted, emphasis added).

tariffed rates has been consistently applied since the first access tariffs were introduced. In light of this clear statement of Commission policy, Bell Atlantic's interpretation of the *Special Construction NPRM* is specious.

Second, Bell Atlantic's statement that, in 1984, the Commission referred to ICBs generally as "special construction lines[17]" is simply untrue. Then, as now, the Commission, the LECs and other parties in the industry recognized ICB as a ratemaking practice that could apply to any facility or service. Then, as now, "special construction" designated the design and deployment of facilities to customers that were not adequately served by "existing lines or ordinary tariffed facilities,"[18] and was not applied to services provided over those facilities, or other tariffed offerings, such as hourly labor rates for technicians. Indeed, in the *Special Construction NPRM*, the Commission expressly stated that "[w]e do not believe that the provision of equal exchange access for Other Common Carriers should qualify as a special activity."[19] Thus, even if Bell Atlantic's assertions that Commission policy at one time held that ICB arrangements were not common carrier services -- and, as we show above, the Commission has never adopted such a policy -- its argument would not be applicable to the expanded interconnection offerings that were the focus of the *Supplemental Designation Order*.

---

[17] Bell Atlantic Petition at 3.

[18] *Special Construction NPRM*, 97 F.C.C.2d at 979. Indeed, in the NPRM, the Commission noted that "[m]ost special construction under this tariff involves lines for television transmission." *Id.*

[19] *Id.* at 991 n.37.

Finally, Bell Atlantic's reliance on the Second Report and Order in CC Docket No. 87-313[20/] (the price cap proceeding) is similarly misplaced. Bell Atlantic quotes a provision from that order which states that, while some ICB arrangements evolve into average-rated offerings, others will remain truly unique arrangements.[21/] In quoting the Commission, however, Bell Atlantic eliminates two footnotes. The first follows the Commission's statement that some ICBs evolve into fully tariffed, average-rated services. In so stating, the Commission cites with approval its decisions in CC Docket No. 88-136 -- the same proceeding discussed in subsection A, above, which found LEC ICB rates for high capacity service to be unreasonable, and which ordered the full tariffing of averaged rates for those services. This decision clearly fails to support Bell Atlantic's assertion that ICB ratemaking invariably removes a service from the Commission's Title II jurisdiction.

Similarly, in its statement regarding ICBs that remain unique, customer-specific service arrangements, Bell Atlantic deletes the Commission's footnote that limits such arrangements to special construction offerings.[22/] Thus, the language cited by Bell Atlantic clearly is inadequate to support the LEC's assertion that all ICB arrangements are by definition not common carriage.

20/ *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990).

21/ Bell Atlantic Petition at 2-3 (citing 5 FCC Rcd at 6810, ¶ 193).

22/ 5 F.C.C.2d at 6845, n.219.

C. The Bell Atlantic Filing Mischaracterizes the Recent Court of Appeals Dark Fiber Remand Decision

Bell Atlantic attempts to cite the recent decision of the United States Court of Appeals for the District of Columbia Circuit[23/] that suspended and remanded the Commissions' orders concerning the regulation of dark fiber as support for its claim that "ICB arrangements are not generally-available, common carrier services."[24/] This assertion wholly misconstrues the decision.

The Court's decision focused exclusively on the dark fiber services that were the subject of the Commission orders under appeal, and cannot be read to apply to Bell Atlantic's expanded interconnection services, which are the subject of Bell Atlantic's petition. Moreover, the Court did *not* find that the dark fiber services at issue were not common carrier offerings. Rather, the Court held that the Commission had not provided adequate justification for its exercise of Title II jurisdiction over dark fiber. In remanding the dark fiber orders to the Commission for further consideration, the Court made clear that it was not prejudging this issue: "Without expressing any opinion on whether the Commission may have a *different* and adequate reason for regulating dark fiber, [the Court is] not satisfied with the logic underlying the orders as they stand now."[25/] The Court decision therefore is not dispositive as to the common carrier status

---

[23/] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), (*Remand Decision*).

[24/] Bell Atlantic Petition at 2-3.

[25/] *Remand Decision*, 19 F.3d at 1480-81 (emphasis added).

of dark fiber, much less any other LEC ICB service offering. Bell Atlantic's reference to the Court decision clearly is overreaching, and cannot provide support for its petition.

D. The FCC's Policy on ICB Ratemaking Is Fully Supported by Precedent and Compelling Public Policy Considerations

The Bell Atlantic Petition essentially asks the Commission to establish a *per se* test for common carriage by finding that any ICB pricing arrangement automatically removes a LEC service or facility from Title II regulation. Such a finding, however, would not pass judicial review. In the *Southwestern Bell* decision discussed above, the Court noted that "a carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers."[26/] In so saying, the Court apparently recognized that ICB pricing could easily be used by LECs to circumvent Commission scrutiny of LEC service rates under Title II.

Indeed, a substantial line of cases holds that a number of public policy factors may confer common carrier status on a given service or facility. For example, in considering the regulatory status of Multipoint Distribution Service ("MDS"), the Commission noted that MDS service agreements frequently contained terms that were typical of private contracts. Nevertheless, the Commission concluded that "despite certain non-common carrier characteristics of MDS, the licensee's obligation to make

---

26/ *Remand Decision*, 19 F.3d at 1481 (*citing Akron, C. & Y. R.R. v. Interstate Commerce Comm'n*, 611 F.2d 1162, 1167 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980) ("even at common law, a carrier could not put off its common-carrier status by mere contractual provision.")).

non-discriminatory offerings of its service to the public is critical to the designation of MDS as a common carrier service."[27/]

Other cases reviewing the Commission's Title II jurisdiction have considered whether service providers possess market power, and whether there are any countervailing factors militating against the exercise of such power.[28/] For example, in a 1992 decision, the Commission decided that access to billing name and address information of LEC subscribers should be treated as a Title II common carrier service because only LECs could provide such information accurately and in an up-to-date form.[29/] Similarly, the Commission decided to treat access to the Service Management System, a centralized data base system providing a national coordinated system for the assignment of 800 numbers, as a common carrier service because its administrator is a monopoly service provider and it is essential to provide such access on a nondiscriminatory basis at reasonable rates.[30/]

The Commission's decision to require LECs to identify rates for expanded interconnection in their tariffs -- the decision against which the Bell Atlantic petition is

---

[27/] *Revision to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Services*, 104 F.C.C.2d 283, 287 (1986). *See, e.g., Graphnet Systems, Inc.*, 73 F.C.C.2d 283, 298 (1979) (Commission rejected argument that, because certain services were provided by contract, they were not common carrier services held out to the general public).

[28/] *E.g., Norlight Request for Declaratory Ruling*, 2 FCC Rcd 132, 134 *recon. denied*, 2 FCC Rcd 5167 (1987).

[29/] *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528, 3532 (1992).

[30/] *Provision of Access 800 Service*, 8 FCC Rcd 1423, 1426-27 (1993).

specifically directed -- is founded on policy considerations no less compelling than those that justified the extension of Title II jurisdiction in the cases cited above. The Commission's expanded interconnection rules were designed to promote competition for local services through expanded interconnection of LECs' networks with those of their competitors. In doing so, however, these rules establish LEC expanded interconnection arrangements as essential bottleneck facilities -- if competitors cannot have reasonable access to these arrangements at reasonable rates, they cannot interconnect with the LEC networks. It is therefore imperative that the Commission subject the LECs' rates for expanded interconnection to the greatest possible level of scrutiny.

While the majority of LEC rates for expanded interconnection are currently pending investigation, the Commission has already found that Bell Atlantic and most other LECs have set some rates for expanded interconnection service elements at unreasonable and excessive levels.[31/] Moreover, as MFS has demonstrated in filings before the Commission, in providing collocation pursuant to state tariffs in Pennsylvania, Bell Atlantic has attempted to impose charges that were higher than those of than any other LEC in the country.[32/]

31/ *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 8 FCC Rcd 8344 (1993).

32/ MFS Communications Company, Inc. Comments Opposing Direct Cases, filed in CC Docket No. 93-162 on September 20, 1993, at page 18; MFS Communications Company, Inc. Petition to Reject, or Alternatively Suspend and Investigate Portions of Proposed Collocation Tariffs, filed in CC Docket No. 91-141 on March 17, 1993, at Attachment E.

If Bell Atlantic's petition were granted, Bell Atlantic would be allowed to establish charges for expanded interconnection -- and for other services -- in its interstate tariff on an ICB basis, and would be able to insulate the filings from the Commission's tariff review process. As a result, Bell Atlantic would have the ability unilaterally to eliminate any effective and timely means for the Commission and interested parties to determine whether these rates are reasonable. Such an outcome clearly would violate the Communications Act's prohibition against excessive and unreasonably discriminatory rates, and would profoundly inhibit the growth of competition for local services. These concerns therefore compel denial of the clarification sought by Bell Atlantic.

III. CONCLUSION

As discussed herein, the Commission's *Supplemental Designation Order* is fully consistent with established Commission policy and relevant court precedent. The Commission should therefore deny Bell Atlantic's Petition for Clarification.

Respectfully submitted,

Andrew D. Lipman
Jonathan E. Canis

SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500

Attorneys for
MFS COMMUNICATIONS COMPANY, INC.

Cindy Z. Schonhaut
Vice President
Government Affairs
MFS Communications Company, Inc.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7709

Dated: August 29, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 1994, copies of the foregoing MFS COMMUNICATIONS COMPANY, INC. OPPOSITION TO BELL ATLANTIC PETITION FOR CLARIFICATION were sent via Hand-Delivery or First-Class Mail*, U.S. postage prepaid, to the following:

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

A. Richard Metzger
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

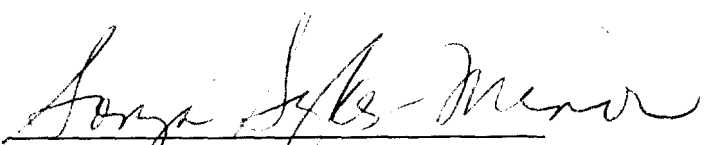
Amy Glatter
Tariff Division
Federal Communications Commission
Room 518
Washington, D.C. 20554

Lawrence W. Katz*
Counsel for Bell Atlantic Telephone Companies
1710 H Street, N.W.
Washington, D.C. 20006

Kathleen M.H. Wallman
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Gregory J. Vogt, Chief
Tariff Division
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

International Transcription Services
1919 M Street, N.W.
Room 246
Washington, D.C. 20006



Sonja L. Sykes-Minor

129467.1